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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

THE UNITED STATES OF AMERICA, PETITIONER

v.

OTOE AND MISSOURIA TRIBE OF INDIANS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled case on May 3, 1955.

OPINIONS BELOW

The opinions of the Indian Claims Commission are reported in 2 Ind. Cl. Com. 335, and, together with the Commission's findings of fact, appear in Appendix B, *infra,* pp. 69b-116b. The opinion of the Court of Claims, reported at 131 F. Supp. 265, appears in Appendix B, *infra,* pp. 1b-69b.

JURISDICTION

The judgment of the Court of Claims was entered May 3, 1955 (App. B, 1b, 69b). The jurisdic-

tion of this Court is invoked under 28 U. S. C. 1255 and section 20(c) of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1054, 25 U. S. C. 70s.

QUESTIONS PRESENTED

1. Whether Congress by section 2 of the Indian Claims Commission Act created liability, not otherwise existing, with respect to payment for original Indian title or right of occupancy as if it were equivalent to recognized Indian title.

2. Whether, if the Act creates such liability, it is to be measured by reference to the fee simple value of lands the claimants' ancestors occupied only under original Indian title.

STATUTE INVOLVED

Section 2 of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1050, 25 U. S. C. 70a, provides:

> The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject

to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.

All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

* * * * *

STATEMENT

At the beginning of the nineteenth century the Otoe and Missouria Tribe of Indians, respondent, was located in what is now the southeastern part of Nebraska between the Platte River on the north and the Great Nemaha River on the south (App. B, 70b, 92b). The tribe continued to occupy villages in the Platte River area and to hunt over the area

between the Platte and Great Nemaha Rivers in Indian fashion up to the time of the negotiation of the treaties hereafter described (App. B, 92b-93b). The tribe also claimed an undefined area east of the Missouri River over which it sometimes roamed and hunted (App. B, 71b).

By the Treaty of July 15, 1830, 7 Stat. 328, respondent tribe, the Sacs and Foxes, the Omahas, the Ioways, and the Medawah-Kanton, Wahpacoota, Wahpeton and Sisseton Bands of Sioux, "being anxious to remove all causes which may hereafter create any unfriendly feeling between them, and being also anxious to provide other sources for supplying their wants besides those of hunting, which they are sensible must soon entirely fail them," jointly ceded and relinquished to the United States all their right and title to approximately 11,000,000 acres east of the Missouri River,[1] with the understanding that "the lands ceded and relinquished by this Treaty, are to be assigned and allotted under the direction of the President of the United States, to the Tribes now living thereon, or to other such Tribes as the President may locate thereon for hunting, and other purposes" (App. B, 72b-73b). For this cession of its claimed interest in these lands, respondent tribe received an annuity of $2,500.00 for 10 years, the services of a blacksmith and agricultural tools to the value of $500.00 per year for 10 years, participation in an

[1] These lands were for the most part located in what is now the State of Iowa, but they extended into southern Minnesota and northern Missouri (App. B, 72b).

educational fund, and a share in the distribution of goods valued at $5,132.00, all of which was to be "considered as a full compensation for the cession and relinquishments herein made" (7 Stat. at pp. 329-330). Subsequently, the United States desired to open part of this area to settlement by whites, and respondent tribe, by the Treaty of October 15, 1836, 7 Stat. 524, relinquished whatever rights it had retained in what is now the northwestern corner of Missouri for a consideration of $2,250.00 (App. B, 74b). Later, by the Treaty of March 15, 1854, 10 Stat. 1038, respondent tribe relinquished all claims that it might have had to lands east of the Missouri River, no specific portion of the total cash consideration of $463,423.74 given respondent by that treaty being allocated to such relinquishment (App. B, 80b-81b).

Meanwhile, by the Treaty of September 21, 1833, 7 Stat. 429, respondent tribe had ceded to the United States a tract of 792,000 acres lying between the Great Nemaha and Little Nemaha Rivers, being the southernmost portion of its claimed territory in Nebraska (App. B, 78b). For this cession respondent received a consideration of $39,410.15 (App. B, 79b). Later, by another provision of the Treaty of March 15, 1854, mentioned above, respondent ceded to the United States all of its remaining lands west of the Missouri River, being a tract of 1,250,000 acres lying between the Little Nemaha and Platte Rivers (App. B, 79b-80b). By this same treaty and a supplemental Treaty of December 9, 1854, 10 Stat. 1130, there was granted

to respondent a tract owned by the United States 10 miles wide by 25 miles long and containing 162,107.71 acres entirely outside of the area ceded by respondent (App. B, 79b-80b).

In its petition before the Indian Claims Commission asserting seven causes of action based upon inadequacy of consideration for these various relinquishments, respondent relied for recovery upon clauses (3) and (5) of section 2 of the Indian Claims Commission Act, *supra,* pp. 2-3. In view of the disposition made of four of the claims by the Commission and the Court of Claims,[2] only three (the first, third and fourth) are material here. Respondent tribe has not at any time asserted any greater right in the lands ceded than that of "original Indian title" (App. B, 5b, 92b, 96b, 99b).

The first cause of action asserted that the consideration (alleged to be 2.8 cents per acre) for respondent's relinquishment by the treaties of 1830, 1836 and 1854 of its rights in the lands east of the Missouri River was unconscionable (App. B, 91b-92b). In its opening brief before the Commission (p. 64), respondent conceded that its proof was not sufficient to establish "Indian title" in accordance with the usual standards, in that the evidence did not show any exclusive possession of a defined area. Consequently, its claim in this cause of action was based upon an undivided one-seventh interest in all

[2] These four claims (the second, fifth, sixth and seventh) were based upon events not referred to above, and each was dismissed by the Commission as not establishing a cause of action against the United States (App. B, 96b, 104b, 109b). The dismissals were affirmed by the Court of Claims (App. B, 48b, 64b, 68b).

of the lands east of the Missouri (App. B, 91b-92b). The Commission found that this area was used, occupied, and hunted over by a number of Indian tribes, including those who were parties to the treaties, but that no one tribe, including respondent, had exclusive possession of any definite part of the area, and, therefore dismissed this claim (App. B, 73b-74b, 93b). The Commission also concluded that respondent had at most only hunting rights to be exercised jointly with other tribes over an undefined area, and that the value of those hunting rights was growing less and less as the buffalo and other game disappeared (App. B, 93b). The Commission held that, even granting ownership of such rights, it was unable to determine their value, or that the compensation received therefor was inadequate or unconscionable, or that respondent had been unfairly treated (App. B, 93b). The Court of Claims has remanded this claim for further consideration based on additional evidence.[3]

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[3] While respondent's appeal was pending in the Court of Claims, it filed a motion requesting that the dismissal be vacated and that the cause of action be remanded to the Commission for reconsideration in the light of evidence as to the occupation of the area which had been adduced in another case before the Commission (App. B, 42b). Over objection by the Government, the court granted the motion for remand "since we find it necessary to remand the case on another issue" (App. B, 42b-44b). The other issue referred to by the court was the Commission's determination on offsets. The United States alone had appealed from such determination, but had abandoned its appeal in this respect by not briefing the issue in the Court of Claims. The court remanded the decision on offsets for further consideration in the light of its decision in another case which had been handed down while the appeal in this case was pending (App. B, 68b-69b).

In its third cause of action, respondent sought recovery on the ground that its rights in the 792,000 acres ceded by the 1833 treaty had been relinquished for an unconscionably low consideration (App. B, 96b). The Commission found that respondent had had Indian title to this area, that it had received payment at the rate of 4.9 cents per acre, and that the land had a reasonable value of 75 cents per acre in 1833, or a total of $594,000.00 (App. B, 96b-99b). It concluded that the consideration was unconscionable and that respondent was entitled to an award of $554,589.85, less any allowable offsets (App. B, 99b).[4] The Government appealed from this award on the legal grounds discussed below (pp. 10-11, 13-24, *infra*) and presented here for review, and for the further reasons that neither Indian title nor the determined value were established by the evidence (App. B, 48b-49b). The Court of Claims affirmed the award in all respects (App. B, 55b).

In its fourth cause of action, respondent sought recovery in connection with its 1854 cession of 1,250,000 acres, asserting that the consideration was unconscionable, or, in the alternative, so much less than true value as to indicate dealing less than fair and honorable on the part of the Government (App. B, 55b-56b). The Commission concluded that Indian title was established by the evidence

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[4] The Commission later determined the allowable offsets to be a total of $23,024.05 (App. B, 68b). This amount will probably be reduced upon the remand ordered by the Court of Claims, note 3, *supra*.

(App. B, 100b). The majority found that the consideration for the cession was 42 cents per acre, or a total of $463,423.74, that the value of the lands at the time of cession was $1.00 per acre, or a total of $1,087,892.29, and that, while the consideration might not have been so inadequate as to be unconscionable, it was, in view of all the facts and circumstances disclosed by the record, unfair and unjust to respondent (App. B, 100b-101b). The majority accordingly found respondent entitled to an award of $624,468.55 (the difference between $1,087,892.29 and $463,423.74), less any allowable offsets (App. B, 101b-102b).[5]

Both sides appealed from this award, respondent asserting that the determined value was too low, and the Government appealing on the legal grounds outlined below, plus the claim that the evidence did not support the findings as to Indian title or value

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[5] As has been noted (*supra*, p. 5), the 1854 treaty did not allocate the stated consideration between lands west of the Missouri River and those east of the river—providing simply a total payment of $463,423.74 and granting the tribe 162,-107.71 acres of government lands—and there was no evidence upon which any allocation could be based (App. B, 81b). A majority of the Commission dealt with this problem by concluding that all the consideration should be allocated to the lands west of the river, since any rights in lands to the east "were only hunting rights, the value of which are [*sic*] little, if anything," and by simply deducting the reservation lands granted the tribe on an acre for acre basis, leaving for consideration a net cession of 1,087,892.29 acres (1,250,000 less 162,107.71) (App. B, 100b). Associate Commissioner O'Marr dissented from the award on this claim, deeming it erroneous because of the lack of evidence as to the allocation of the consideration and the value of the lands granted to respondent (App. B, 110b-116b).

(App. B, 56b, 59b). The Court of Claims affirmed in all respects (App. B, 60b).

Insofar as material here, the Government's argument to the Court of Claims was that Congress by clauses (3) and (5) of section 2 of the Indian Claims Commission Act, *supra*, pp. 2-3, did not create a cause of action or admit liability in the Government when the treaty sought to be revised or the dealings claimed to be less than fair and honorable involved lands held under original Indian title, as opposed to a recognized title (see App. B, 5b-6b). In other words, the Government's position was that, as held in *Tee Hit Ton Indians* v. *United States*, 348 U.S. 272, a tribe's original Indian title or right of occupancy of certain lands was not a property right, that any payment made in the "purchase" of such lands was simply a gratuity, and hence that the amount paid could not be said to be unconscionably small, or "unfair" or "dishonorable."

After analysis of the legislative history of various bills leading up to the Act as finally enacted, the Court of Claims held that the primary purpose of the statute was to settle all meritorious claims of Indian tribes by creating causes of action and recognizing liability in the Government, and that the literal reading of clauses (3) and (5) required the inclusion of claims relating to Indian title land (App. B, 7b-19b). It buttressed this holding by reference to clause (4), relating to "claims arising from the taking by the United States, whether as a result of a treaty of cession or otherwise, of lands

owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant" (App. B, 20b-37b). The court held that under that clause Indian tribes could recover for every uncompensated taking of Indian title lands, and reasoned that therefore Congress must have intended recovery under clauses (3) and (5) when lands held under Indian title were ceded for an inadequate consideration (App. B, 21b). The court found support for its conclusions in this Court's references to the Indian Claims Commission Act in *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 273-4, 281-282 (App. B, 37b-40b).

With respect to the valuation issue, the court considered the alternative of (1) valuing the lands involved on the basis of the value to the Indians of the use of the lands for subsistence for hunting, as against (2) the substantially higher value of the lands on the basis of the full fee title (App. B, 52b-54b). The court rejected the subsistence approach, stating, "Values cannot be determined on the basis of berries and wild fruits" (App. B, 55b), and held that the value of the fee should be the basis for the award.

REASONS FOR GRANTING THE WRIT

1. The questions presented are of fundamental and far-reaching importance in cases under the Indian Claims Commission Act. Like this case, 249 of the 396 cases now pending before the Commission involve claims based upon original

Indian title.[6] As indicated by the summary of these Indian title claims in Appendix A, *infra*, pp. 1a-5a, in 79 cases it is impossible to estimate the acreage involved, but the balance of the claims involve an estimated 1,323,165,061 acres, without deduction for overlaps among claims. (For comparison, the total land area of the United States is about 1,905,000,000 acres.) Under the decision below respondent tribe has recovered an award of $1,179,058.48, with the possibility of additional recovery on its first cause of action (see *supra*, pp. 6-7). Some indication of the Government's potential liability appears from the fact that respondent's claims, several of which were denied, included 4,162,472 acres, so that its present award is at the rate of approximately 25 cents per acre for all acres claimed, including those for which recovery was denied. The same rate of recovery on the total acreage estimated to be involved (1,323,165,061 acres) would indicate a total recovery on Indian title claims of more than $300,-

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[6] A few of these 249 cases involve claims relying upon clause (4), rather than clause (3) and/or (5), of section 2 (*supra*, pp. 2-3). As we indicate below (p. 20), a decision for the Government in the instant case might not dispose of the clause (4) claims based on original Indian title, although they would, of course, be determined favorably to the tribes under the decision of the court below. The more significant point, at any rate, is that the great majority of the claimants, like respondent in this case, invoke clauses (3) and (5) so that the ultimate result here will be decisive one way or the other in most instances.

000,000,[7] without considering at all the 79 cases in which areas have not been estimated. And, while varying in detail, the dealings of the United States with respondent are typical of the transactions had with other Indian tribes—for instance, the other six tribes claiming an interest in the lands east of the Missouri under the Treaty of 1830, *supra*, pp. 4-5.

It seems clear, therefore, that the number and magnitude of the cases directly affected by the decision below are closely comparable to the similar considerations underlying the granting of certiorari (with the Government's consent) in *Tee-Hit-Ton Indians* v. *United States*, 348 U. S. 272. As in that case, the question here presented is important to future legislation designed to assure equality of treatment among the Indian tribes. A conclusion that the United States has assumed liability for original Indian title for claims asserted under the Indian Claims Commission Act will undoubtedly have a substantial bearing upon legislation relating to claims arising subsequent to that Act.

2. In a suit under the Indian Claims Commission Act, any award based solely upon inadequacy of consideration for the cession of Indian title lands seems erroneous. It is now settled that

[7] Of course, since lands for which an award was actually made in this case were valued at 75 cents and $1.00 per acre (*supra*, pp. 8-9) the maximum possible liability is many times the amount computed above.

original Indian title was not a compensable property right, that any payment for the relinquishment of such an interest in lands was a gratuity, and that no award may be made for the taking of this title "without specific legislative direction to make payment." *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272, 279-285, 288-291; *United States* v. *Tillamooks,* 341 U.S. 48; *Hynes* v. *Grimes Packing Co.,* 337 U.S. 86, 106, n. 28, quoted and applied in *Tee-Hit-Ton,* at 283. There is no such direction in clauses (3) and (5) of Section 2 of the Act. Since the original payment was a gratuity, it follows that any consideration, however small, for the treaty cession of Indian title lands cannot well be found to be "unconscionable" so as to afford a basis for revision of the treaty agreement, and cannot be said to indicate less than "fair and honorable dealings."[8] A nation exercising long-recognized powers of sovereign occupancy without compensation (see *Tee-Hit-Ton, supra,* at 279-281) should not be charged legally or ethically if its wholly

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[8] By the same token, duress and the other bases stated in clause (3) of section 2 as grounds for revision of a treaty or contract cannot justify the award of compensation for the cession of Indian title. We note, nevertheless, that the Court of Claims appears to have been mistaken when, in affirming the Commission's award on the fourth cause of action, it observed (App. B, 60b) that "The Commission believed that a certain amount of duress was practiced on the tribe in the negotiation of the treaty * * *." The Commission stated no such belief; indeed, it made the award, not under clause (3) (specifically allowing treaty revision for "duress," among other things), but under clause (5), relating to claims "based upon fair and honorable dealings * * *."

gratuitous payment is not as generous as the donee or a third person thinks it ought to be.

While Congress provided, in general terms, in clause (3) for treaties to be regarded as if revised on stated grounds, it does not follow that, as the Court of Claims reasoned (App. B, 10b, 17b-19b), treaties relating to lands under non-compensable Indian title should be treated identically with treaties concerning lands held under recognized Indian title. Similarly, the fact that Congress has permitted the court to adjudicate claims based upon "fair and honorable dealings" is no ground for concluding that the Act meant Indian occupancy should be treated as if it were a property right. Congress has explicitly enlarged the liability of the United States in some particulars, but it nowhere provided that Indian title should be altered and become a property right affording a basis for compensation. Having in mind the strictness with which such alleged assumptions of liability must be viewed (*Klamath Indians* v. *United States,* 296 U.S. 244, 250), the conclusion must be that the Act does not change the noncompensable nature of original Indian title.

The interpretation given to the legislative history of the Act by the Court of Claims as a basis for its contrary conclusion is erroneous. As the court observed (App. B, 11b), the history of the Indian Claims Commission Act begins with the so-called Meriam Report (Institute for Government Research, *The Problem of Indian Adminis-*

tration (1928)). That report (pp. 19, 468, 805) pointed out that the existence of Indian claims was a serious impediment to the progress of the race because, in the mind of the Indian, justice was being denied and, regardless of the validity of the claims, the possibility of some day receiving large awards was influencing the individual Indians to refuse to work or make definite plans for their future. These attitudes rendered extremely difficult any cooperation between the Government and the Indians. In recommending the earliest possible settlement of all such claims, the report stated (p. 468): "If a claim is good it should be declared so at once in order that the money due may be available for the advancement of the Indian, while if it is bad it is equally important that the Indians should know it, so that they may put aside their dreams of wealth and go to work to improve their economic status by their own efforts." The House Committee on Indian Affairs, in favorably reporting the bill which was eventually enacted as the Indian Claims Commission Act, also referred to the existence of claims as a serious barrier to the economic progress of the Indian and stated that the "primary objective" of the bill was "to grant the Indian his long-delayed day in court." H. Rept. No. 1466, 79th Cong., 1st sess., pp. 1-2, 5-6. And while it is clear that the Committee, in keeping with the recommendation of the Department of the Interior, intended to make the jurisdiction of the Commission

broad enough so that all possible claims could be adjudicated, *i.e.,* allowed or denied (*id.,* pp. 10, 14-16), there is nothing in the report to indicate an intention of creating a liability not previously existing on all such claims. To the contrary, the limits of any such admission of liability were carefully set out. *Id.,* pp. 10-12.

The subsequent legislative history does not change the picture. The Senate Committee on Indian Affairs amended section 2 of the bill as passed by the House by striking out clauses (3) and (4) (the "revision of treaties" clause and the "taking without just compensation" clause), but leaving in the bill the clause dealing with claims based on fair and honorable dealings (clause (5) as finally enacted). Its report stated (S. Rept. No. 1715, 79th Cong., 2d sess., p. 5):

> The language stricken on page 1, and through line 23 on page 2 in section 2, is not clear and it is believed that if it is not eliminated litigation would be necessary to determine its meaning. The charge has been made that the stricken language might be interpreted to establish new rules of substantive law which would have the effect of prejudging the merits of particular cases. The committee is interested in providing a forum for the Indian claimants to assert their claims and not, of course, in prejudging particular claims against the Government. This amendment is

> recommended for purposes of clarification and there is no intention on the part of the committee to deprive claimants of the right to invoke the jurisdiction of the Commission in any case which would have been cognizable under the language of the bill as it passed the House.

Obviously, the Senate Committee's chief interest, like that of the House Committee, was in providing a forum for the adjudication of Indian claims rather than in creating new causes of action and admitting liability.

The bill as amended in committee was passed by the Senate, and the conferees subsequently agreed to the reinsertion in the bill of clauses (3) and (4). The managers on the part of the House explained that the reason for such action was that the conferees "wanted to make sure that if any tribal claimant could prove facts *sufficient to make a case* under either of these classifications, the Commission would have authority to make an award to such claimant. * * * Both of the classes of claims reinserted by this amendment may fall within the category of 'fair and honorable dealings.' To set them forth explicitly helps to clarify the contents of that category." H. Rept. No. 2693, 79th Cong., 2d sess., pp. 5-6 (emphasis added). The primary intent of Congress remained to provide a forum for all claims rather than, as the Court of Claims reasoned (App. B, 16b-17b), to admit liability and direct payment in all cases for which a forum was provided.

We should not be taken as contending that the Act did not in any case admit liability and direct payment. For example, there can be no doubt that Congress intended by clause (3) to permit a treaty to be considered as revised if specified grounds exist. But there is no indication in the Act or legislative history which would justify the conclusion that Congress thereby intended to raise the status of Indian title to that of a compensable property right and to authorize additional payments beyond the amounts gratuitously given by Congress when such lands were originally acquired. Rather, the reasonable conclusion is that Congress was providing a remedy only for those cases in which Indians had legal or equitable rights similar to those which would support relief under general contract or property law,[9] and, to the extent specified in the Act, was simply expanding the protection accorded to such rights. As we have shown, *supra,* pp. 13-14, unrecognized Indian title is not such a right. And, if clause (3) did not create a cause of action in claims such as are here presented, it is plain that the "fair and honorable dealings" provision in clause (5) did not do so either. See H. Rept. No. 1466, 79th Cong., 1st sess., p. 12; H. Rept. No. 2693, 79th Cong., 2d sess., p. 6; Hearings, House Committee on Indian Affairs, on H. R. 1198 and H. R. 1341, 79th Cong., 1st sess., pp. 116-117.

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[9] Thus, contrary to the reasoning of the Court of Claims (App. B, 10b), relief could be afforded with respect to lands held under a recognized Indian title without any necessity, legally or morally inspired, of extending the same remedy to lands held under original Indian title.

The view that clause (3) created a cause of action for claims based on treaties dealing with Indian title land cannot be supported, as the Court of Claims concluded (App. B, 20b-21b), by reference to clause (4). The court reasoned (App. B, 21b): "If clause (4) permits Indian claimants to recover for the uncompensated taking (deprivation) by treaty or otherwise of a property right which in itself created no legal right in the owner against the Government, it would seem reasonable to conclude that Congress also intended that the same property right ceded under a ratified treaty of cession for a grossly inadequate consideration, would give rise to a cause of action under clause (3)." It may well be that clause (4) provides recovery, as did the special act in the *Tillamook* case, in cases where the appropriate government agents had agreed with the Indians on an amount to be paid for Indian title but for some reason the treaty was not ratified. As so construed, the Act would have the effect of equalizing the treatment of a claimant tribe with that of other tribes which had received payment for Indian title pursuant to their agreements. Cf. *Tee-Hit-Ton Indians* v. *United States,* 348 U. S. 272, 284. But there is no warrant for the Court's assumption that clause (4) equalized all original Indian titles with recognized title, and that other clauses of the Act must be similarly broadened.

Striking evidence that no such result was intended is supplied by the legislative history of a bill pending at the time the Indian Claims Com-

mission Act was in the final stages of enactment. As indicated in the opinion of the court below (App. B, 31b), a number of proposed special jurisdictional acts were then pending, and it was the hope of Congress that passage of the Indian Claims Commission Act would obviate the necessity of acting on the other bills. Yet, on the same day that the House passed the general act it also passed a special bill which would have permitted the Salish and Kootenai Indians to sue and recover for the taking of Indian title "without compensation and without their consent." 92 Cong. Rec., pp. 5285, 5323. This bill was calendared in the Senate on the same day that the bill which eventually became the Indian Claims Commission Act was referred to committee, and it was soon favorably acted upon by the Senate. 92 Cong. Rec. 5328, 6901. If those in charge of both bills had intended that the Indian Claims Commission Act would create a cause of action for the taking of Indian title in all cases, it is clear that they would not have devoted time to the Salish-Kootenai bill. And the Executive reaction to both bills is further evidence of the contemporaneous interpretation of the Act in this respect. On June 28, 1946, President Truman vetoed the Salish-Kootenai bill, pointing out that the bill declared "any taking of the lands of the Indians by the United States, without compensation and without their consent ***, to be sufficient grounds for suitable relief," and stating, "Thus the bill does not merely waive the statute of limitations and laches, and provide a forum for the adjudica-

tion of any preexisting claims which the Indians may have against the United States, but it seeks to create liability against the Government which would not otherwise exist. * * * Neither on legal nor moral grounds would there seem to be any justification for legislation of this kind." 92 Cong. Rec. 7999. Yet, shortly thereafter, on August 13, 1946, President Truman signed the Indian Claims Commission Act, stating, "* * * we stand ready to submit all such controversies to the judgment of impartial tribunals." White House Press Release, August 13, 1946. Plainly, both the legislative and executive branches were of the view that the Claims Commission Act did not create unlimited liability for the extinguishment of Indian title claims.

3. Should it be determined that the Indian Claims Commission Act created liability and directed payment of claims based upon Indian title such as are here involved, there would remain the further significant question as to the standards for measuring such liability. The single, simple criterion adopted below was the fee simple value of the lands at the time of their cession. It may be questioned whether any such arithmetical approach—without regard to the need or numbers or other circumstances of the descendants claiming recovery for wrongs to their ancestors—properly appraises the considerations which impelled Congress "to grant payments from the public purse to needy descendants of exploited Indians." *Tee-Hit-Ton Indians* v. *United States, supra,* at 273-

274. But even assuming valuation of the land to be a sufficient guide in itself, we think it clearly erroneous to employ the value of a fee simple title the Indians never had or claimed rather than the value of the far more limited hunting and occupancy uses of which original Indian title was comprised. Cf. *Tee-Hit-Ton Indians* v. *United States, supra,* at 295 (dissenting opinion).

Undeniably, there would be a very substantial difference in the determined value depending upon the standard applied, as is well demonstrated by the Commission's reasoning (App. B, 98b, 100b) that 42 cents per acre paid for lands ceded in 1854 could "hardly be considered as compensation for only a quitclaim, rather than for recognized Indian title," and that the value of hunting rights was "little, if anything." Indian title with its imperfections does not compare with the fee simple. It cannot now be denied that Indian title is merely a right of temporary occupancy and that it may be extinguished by the sovereign at will without liability for compensation. *Tee-Hit-Ton Indians* v. *United States, supra,* at 285. And in purchasing Indian title, rather than asserting possession by the sword, the Government has paid to the Indians for their unimproved lands "as much as the privilege of hunting and taking game upon them is supposed to be worth." H. Rept. No. 227, 21st Cong., 1st sess., p. 6. Clearly, in determining whether the Government was acting fairly and honorably in its dealings and whether a purchase price was unconscionable, it would be unfair to charge the Gov-

ernment on the basis of the value of the fee simple title, which it possessed before its dealings with the Indians. Yet that is the rule established by the court below in this case to be applied in examining all such claims.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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